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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER JEREMY DIRKSEN,

Defendant and Appellant.

2d Crim. No. B292501
(Cons. w/ No. B292502)
(Super. Ct. Nos. 2017031326
& 2017037280)
(Ventura County)

OPINION FOLLOWING
REHEARING

Peter Jeremy Dirksen appeals from the judgment after he pled guilty to second degree murder (Pen. Code,¹ §§ 187, subd. (a), 189, subd. (b)) and assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)), and admitted an allegation that he inflicted great bodily injury when he assaulted his victim (§ 12022.7, subd. (a)). Dirksen also admitted allegations that he suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and prior serious felony conviction (§ 667, subd. (a)), and that he served a prior prison

¹ All further statutory references are to the Penal Code.

term (§ 667.5, subd. (b)). The trial court sentenced him to 23 years to life in state prison: 15 years to life on the murder conviction, a consecutive three years on the assault conviction, and a consecutive five years on the serious felony enhancement.

Dirksen contends: (1) the trial court erroneously denied his motion to withdraw his plea, and (2) the case should be remanded to permit the court to exercise its discretion to impose or strike the prior serious felony enhancement. We affirm Dirksen's convictions, and remand.

FACTUAL AND PROCEDURAL HISTORY

Dirksen suffocated a woman in a Port Hueneme motel. While awaiting trial on his murder charge, he hit his cell mate and fractured his cheekbone.

Dirksen pled guilty to murder and assault in exchange for a negotiated sentence of 23 years to life in prison. Prior to sentencing, Dirksen moved to withdraw his plea. He claimed he wanted to plead no contest rather than guilty, and that counsel lied to him about the amount of time he would spend in prison as a result of his plea.

The trial court appointed conflict counsel to investigate Dirksen's request. Counsel determined there were no grounds to withdraw the plea. The court denied Dirksen's motion.

DISCUSSION

Ineffective assistance of counsel

Dirksen contends he should be allowed to withdraw his plea because counsel provided ineffective assistance when he: (1) lied about the amount of time Dirksen would serve in prison, (2) did not fully investigate the charges against Dirksen, and (3) permitted Dirksen to sign his plea despite being under the

influence of medication. Nothing in the record sheds light on these contentions. Dirksen's ineffective assistance of counsel claim cannot be resolved in this appeal. (*People v. Kelly* (2006) 40 Cal.4th 106, 126.)

Prior serious felony enhancement

Effective January 1, 2019, the trial court has discretion to strike a prior serious felony enhancement that was imposed pursuant to section 667, subdivision (a). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971; see § 1385, subd. (b)(1).) Dirksen contends we should remand his case to permit the court to exercise that discretion. We agree. (*Garcia*, at p. 973.)

The Attorney General speculates that the prosecution will be deprived of the benefit of the plea bargain if the case is remanded. But at the conclusion of the remand hearing, the trial court may decide to impose the enhancement once again. Or if it decides to strike it, the court may refashion the components of Dirksen's sentence to maintain an aggregate term of 23 years to life in prison. Whether the Attorney General's speculation proves correct is unknowable until the court exercises its discretion upon remand.

DISPOSITION

The case is remanded to the trial court with directions to hold a hearing to exercise its newfound discretion to impose or strike the prior serious felony enhancement. Dirksen has the right to assistance of counsel at the remand hearing, and, unless he chooses to waive that right, the right to be present. After the hearing, the clerk of the court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Bruce A. Young, Judge
Superior Court County of Ventura

Richard B. Lennon, under appointment by the Court
of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Zee Rodriguez and Michael C. Keller, Deputy
Attorneys General, for Plaintiff and Respondent.